Supreme Court, U. S.
FILED
OCT 5 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-359

FLR CORPORATION, *Appellant,*

v.

BILL BLODGETT, TRUSTEE and TEXAS FIRST MORTGAGE REIT, *Appellees.*

On Appeal From The Supreme Court Of Texas

MOTION PURSUANT TO RULES 16(b) and 16(d) TO DISMISS APPEAL OR AFFIRM JUDGMENT

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INDEX

	Page
MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL	1
OPINION	2
STATEMENT OF THE CASE	2
ARGUMENT	7
THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY RAISED OR EXPRESSLY DECIDED	7
THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS	10
NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED	11
MOTION PURSUANT TO RULE 16(d) TO AFFIRM JUDGMENT	13
CONCLUSION	16
CERTIFICATE OF SERVICE	17
APPENDIX A — Texas Rules of Civil Procedure, Rules 324, 325, 374, 415 and 680	19
APPENDIX B — Notice of Dismissal of Appeal of Dissolution of Temporary Restraining Order	23

LIST OF AUTHORITIES

CASES	Page
Adams v. Southern California First National Bank, 492 F.2d 324, *cert. den.* 419 U.S. 1006	11, 12
Ballard v. Hunter, 204 U.S. 241; 27 S.Ct. 261, 51 L.Ed. 461 (1907)	15
Cafeteria & Restaurant Workers Local 473, AFL-CIO v. McElroy, 367 U.S. 886; 81 S.Ct. 1743, 6 L.Ed.2d 1230 (1961)	15
Edelman v. California, 344 U.S. 357; 73 S.Ct. 293, 97 L.Ed. 387 (1953)	8

CASES	Page
Fullerton v. Texas, 196 U.S. 192; 25 S.Ct. 221, 49 L.Ed. 443 (1904)	8
Hannah v. Larache, 363 U.S. 420; 80 S.Ct. 1502, 4 L.Ed. 2d 1307 (1960)	15
Herndon v. Georgia, 295 U.S. 441; 55 S.Ct. 794, 79 L.Ed. 1530 (1935)	8
Hoffman v. United States Department of Housing and Urban Development, 371 F.Supp. 576 (S.D. Tex., 1974)	11
Holland v. Taylor, 153 Tex. 433, 270 S.W.2d 219 (1954)	9
Leisure Estates of America, Inc. v. Carmel Development Company, 371 F.Supp. 556 (S.D. Tex., 1974)	11
McCauley v. Consolidated Underwriters, 157 Tex. 475, 304 S.W.2d 265 (1957)	9
McCourquodale v. Texas, 211 U.S. 432; 29 S.Ct. 146, 53 L.Ed. 269 (1908)	8
Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972)	12
Newman v. King, 433 S.W.2d 420 (Tex. 1968)	9
Ramsey v. Dunlop, 146 Tex. 196, 205 S.W.2d 979 (1947)	8
Reitman v. Mulkey, 387 U.S. 369; 87 S.Ct. 1627, 18 L.Ed. 2d 830 (1967)	12
State v. Sunland Supply Co., 404 S.W.2d 316, (Tex. 1966)	9
Statler Hotels v. Rosenthal Jewelry Corp., 351 S.W.2d 579, (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.)	9
Walters-Pierce Oil Co. v. Texas, 212 U.S. 112, 29 S.Ct. 227, 53 L.Ed. 431 (1909)	8
West Texas Utilities Co. v. Irvin, 161 Tex. 5; 336 S.W.2d 609, (Tex. 1960)	9

TEXAS RULES OF CIVIL PROCEDURE

Rule 324 (Appendix A)	7, 19
Rule 325 (Appendix A)	20
Rule 374 (Appendix A)	7, 20
Rule 415 (Appendix A)	5, 7, 21
Rule 680 (Appendix A)	7, 14, 21

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On Appeal From The Supreme Court Of Texas

MOTION PURSUANT TO RULES 16(b) AND 16(d) TO DISMISS APPEAL

Bill Blodgett, Trustee, and Texas First Mortgage Reit (TFMR), Appellees in the case sought to be appealed to this Court, move pursuant to Rule 16(1)(b) of the Rules of the Supreme Court of the United States to dismiss the appeal on the ground that: (1) the federal questions sought to be reviewed were not timely raised under the Texas Rules of Civil Procedure, (2) the questions asserted by Appellant were not questions passed on by the Supreme Court of Texas, (3) the Opinion of

the Court sought to be reviewed rests on a substantial and adequate non-federal basis, and (4) no substantial federal question is raised.

In the alternative, Appellee moves pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United States to affirm the judgment and order of the Supreme Court of Texas on the ground that the decision of the lower court is so obviously correct as to warrant no further review by this Court.

OPINION

The Opinion of the Court of Civil Appeals for the Eighth Supreme Judicial District of Texas is reported at 541 S.W.2d 209 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.), and is set forth at Appendix A of Appellant's Jurisdictional Statement.

STATEMENT OF THE CASE

The Opinion of the Texas Court of Civil Appeals correctly stated the nature and result of this case. Since Appellant's statement of the case contains extraneous conclusions and omissions of significant facts, we present our own statement of the case.

This case did not begin, as Appellant states, in Brady, Texas, with the issuance of a temporary restraining order by Judge A. P. Allison of the 198th Judicial District Court, Bandera County, Texas. Rather, the case began the preceding afternoon in Houston, Harris County, Texas, on June 3, 1974, at approximately 4:50 p.m. when FLR Corporation filed suit under Cause No. 984,178 in the 190th Judicial District Court of Harris

County, Texas, requesting that Court to issue an *ex parte* temporary restraining order to enjoin a trustee's foreclosure sale scheduled to be held the next day on June 4, 1974. 190th District Court Judge Madison Rayburn, at the request of Appellees' counsel, agreed to hold a hearing on Appellant's application for a temporary restraining order at 9:00 a.m. the next morning, June 4, 1974. During the night of June 3, 1974, while Appellees' counsel was preparing to appear at the hearing in Judge Rayburn's Court, FLR Corporation and its counsel flew several hundred miles to Brady, Texas, where Judge A. P. Allison of the 198th Judicial District Court was spending the night. In Brady, shortly after midnight, Judge A. P. Allison granted a temporary restraining order. Judge Allison appeared and testified during the trial of this cause and stated that he was not informed by Appellant when it applied for the temporary restraining order that the identical suit was then pending in Harris County, Texas, and scheduled for hearing at 9:00 a.m. the following morning.

The following morning on June 4, 1974, at approximately 9:10 a.m., Appellant filed suit in the 198th Judicial District Court, Bandera County, Texas, under Cause No. 237. Not aware of Appellant's actions, Appellees' counsel appeared at Judge Rayburn's Court in Houston prior to 9:00 a.m. the next morning for the scheduled hearing. At approximately 9:25 a.m., a third lawyer entered Judge Rayburn's courtroom and filed a non-suit on behalf of FLR Corporation in the Harris County suit. Counsel for Appellees learned later during the morning of June 4, 1974, that Judge Allison had issued an *ex parte* temporary restraining order the previous night.

After learning of the order issued by Judge Allison, Appellees requested a hearing which was scheduled for 3:00 p.m. that afternoon. At 11:46 a.m. on June 4, 1974, notice of the 3:00 p.m. hearing to be held by Judge Allison was hand delivered to Mr. Richard Olivere, Chief Executive Officer and President of FLR Corporation. Present at the FLR offices in Bandera with Mr. Olivere when the notice of hearing was delivered was Mr. D. Lee, one of the attorneys who had accompanied Mr. Olivere the previous night to see Judge Allison. Additionally, prior to departing Houston for the trip to Brady, Texas, counsel for Appellees delivered a notice of the hearing to the office of Appellant's counsel and offered him a ride to Brady. Appellees later learned the reason they could not contact Appellant's counsel was because he was returning to Houston from Bandera where he had spent the night. When Appellees arrived in Brady and it became apparent that Appellant and its counsel would not attend the scheduled hearing, a conference call was arranged and a telephone hearing was conducted.

During the course of the telephone hearing all parties were represented on the phone and all counsel participated in the hearing. The telephone hearing was conducted from the offices of the District Attorney in Brady, Texas, because his office was the only one having enough extension telephones located in various rooms to allow the Judge to be on one phone, Appellees' counsel to be in another room on a phone, and the Court Reporter to have an extension. On the Appellant's end of the conference call were Mr. Richard Olivere, President of Appellant, and two lawyers, Mr. Wendell S. Loomis and Mr. Dale Lee. Even though Mr. Olivere and Mr.

Lee both received notice of the scheduled hearing prior to 12:00 noon, neither of them elected to attend the hearing scheduled some three hours later in Brady. The distance between Brady and Bandera is approximately 125 miles and could easily be travelled within the three hour period between receipt of the notice and the scheduled time for the hearing, without exceeding the 70 m.p.h. posted speed limit.

The Court concluded the telephone hearing at approximately 3:45 p.m. by dissolving the temporary restraining order. Subsequently, the trustee held and conducted a foreclosure sale in accordance with the contractual provisions of the Deed of Trust executed between Appellant and Appellee. Following the foreclosure sale Appellees gave Appellant an option to repurchase the land sold by the Trustee. The purchase price under the option was the amount of principle, interest and expenses owing on the debt. By Appellant's own testimony given at the trial, it made no effort to exercise the option.

Appellant indicated an intention to challenge on unspecified grounds the dissolution of the temporary restraining order and thereafter filed an Appeal Bond in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas sitting at San Antonio, Texas. The Appeal Bond was docketed under Cause No. 15,347 on June 24, 1974. The appeal was dismissed on September 4, 1974, in accordance with Rule 415, Tex. R. Civ. P. (Appendix A, Pg. 21) because Appellant failed to prosecute its appeal and file its brief within the time prescribed.

On September 3, 1974, Appellant sued Appellees again in Bandera County, Texas, under Cause No. 253

and sought to recover the reasonable rental value of the real estate because Appellee had taken possession of it subsequent to the sale and after expiration of the option. This suit was consolidated with the previously filed suit, No. 237 pending in the 198th Judicial District Court, and both cases were set for trial on September 30, 1974.

A few days before the scheduled trial date Appellant filed a Chapter XI proceeding in the Bankruptcy Court of the United States District Court for the Western District of Texas, San Antonio Division. Under the provisions of Bankruptcy Rule 11-44, Appellee was stayed from the prosecution of any lawsuit involving Appellant. Thereafter, Appellee applied to the Bankruptcy Court for permission to have the stay annulled and to proceed to trial in Bandera County, Texas, against Appellant. The Bankruptcy Judge, after a hearing in which he considered, *inter alia*, the circumstances of the foreclosure sale, lifted the stay order and allowed Appellee to proceed to trial in the 198th Judicial District Court of Bandera County, Texas. In the Findings of Fact and Conclusions of Law signed by the Bankruptcy Judge on December 23, 1974, the Bankruptcy Judge found that Judge Allison's restraining order had been lifted upon Appellee's motion after notice to Appellant. Appellant elected not to exercise his rights to appeal the Bankruptcy Judge's order.

The consolidated cases proceeded to trial in Bandera County, Texas. The trial lasted approximately two weeks and resulted in a jury verdict in favor of Appellee. The Texas Court of Civil Appeals affirmed the trial court. Appellant's motion for a re-hearing by the Texas Court of Civil Appeals was denied. The Texas Supreme Court

refused to grant a Writ of Error finding No Reversible Error. A rehearing was denied.

ARGUMENT

THE FEDERAL QUESTION SOUGHT TO BE REVIEWED WAS NOT TIMELY RAISED OR EXPRESSLY DECIDED

Appellant belatedly attempts to contend that it has seasonably raised a constitutional challenge to the dissolution of the temporary restraining order, and to the construction allegedly given to Rule 680, Tex. R. Civ. P. (Appendix A, Pg. 22) by the Texas Court of Civil Appeals and the Texas Supreme Court. Appellee submits Appellant has failed to preserve for appellate review the errors now being asserted.

After dissolution of the temporary restraining order Appellant filed an Appeal Bond on June 24, 1974, in the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, Texas. The Appeal was docketed under Cause No. 15,347. Appellant never specified the errors upon which the intended appeal was to be based. On September 4, 1974, in accordance with Rule 415, Tex. R. Civ. P. the appeal was dismissed by the Texas Court of Civil Appeals because Appellant failed to file its briefs. (Appendix B).

Following a jury trial, Appellant did not complain in its Motion for New Trial nor in its Amended Motion for New Trial of the errors it now seeks to have reviewed. Rule 324, Tex. R. Civ. P. (Appendix A, Pg. 19) required Appellant to file a Motion for New Trial. Rule 374, Tex. R. Civ. P. (Appendix A, Pg. 20) provides in pertinent part that:

> " . . . A ground of error not *distinctly* set forth in the motion for new trial, in cases where a motion for new trial is required *shall be considered as waived.*" (Emphasis added.)

This Court has repeatedly ruled that it will not review assignments of error not seasonably raised in accordance with the requirements of state law and passed upon in the judgment of the state court brought for review. *Edelman v. California,* 344 U.S. 357, 358 (1953); *Herndon v. Georgia,* 295 U.S. 441, 443 (1935); *Waters-Pierce Oil Co. v. Texas,* 212 U.S. 112, 115 (1909); *McCorquodale v. Texas,* 211 U.S. 432, 437 (1908); *Fullerton v. Texas,* 196 U.S. 192, 193 (1904).

In 1941 the Texas Rules of Civil Procedure were adopted thereby superseding and eliminating the previous statutory basis for the review of unassigned errors called "fundamental error". Since 1941, however, courts have still considered on a limited basis fundamental errors. In the early case of *Ramsey v. Dunlop,* 146 Tex. 196, 205 S.W.2d 979 (1947), cited by Appellant, it was held that the Court of Civil Appeals correctly reversed a trial court judgment in an election contest case on an error that had not been assigned as error in appellant's brief to that court. The Texas Supreme Court affirmed applying the doctrine of fundamental error. Chief Justice Alexander in his concurring opinion, however, indicated that the application of the doctrine of fundamental error should be limited to cases where:

(1) the unassigned error involves a matter of public interest; and

(2) the record affirmatively and conclusively shows

that the appellee was not entitled to recover; or

(3) the record affirmativley shows that the court rendering the judgment was without jurisdiction over the subject matter.

Id. at 985.

Justice Alexander's limitations have been accepted as controlling. *Newman v. King,* 433 S.W.2d 420, 421-22 (Tex. 1968); *State v. Sunland Supply Co.,* 404 S.W.2d 316, 319 (Tex. 1966); *Holland v. Taylor,* 153 Tex. 433, 270 S.W.2d 219, 220 (1954). If anything, the doctrine of fundamental error is more narrowly construed by the courts of Texas today than by the court in *Ramsey.* In fact, where the rights asserted on appeal belong exclusively to the litigants, the courts have declined to review the error complained of as a fundamental error, *West Texas Utilities Co. v. Irvin,* 336 S.W.2d 609, 611 (Tex. 1960); and have required in the absence of a proper assignment of error that the error claimed as fundamental must appear on the face of the record in order to be reviewable by an appellate court. *McCauley v. Consolidated Underwriters,* 157 Tex. 475, 477, 304 S.W.2d 265, 266 (1957). In *Statler Hotels v. Rosenthal Jewelry Corp.,* 351 S.W.2d 579, 585 (Tex. Civ. App.—Dallas 1961, writ ref'd n.r.e.), it was held that no error deemed fundamental can be raised for the first time on appeal if an examination of the statement of facts is necessary to determine the question.

The errors complained of here do not constitute fundamental errors, nor were they seasonably raised. For example, Appellant raised the error set forth at page 5 of the Jurisdictional Statement for the first time in its

Reply Brief filed in the Court of Civil Appeals contemporaneously with the opening words of Appellant's oral argument. Under Texas procedure, the Appellant's assertion of error in such a manner was not seasonably made. Additionally, as conceded by Appellant at page 7 of its Jurisdictional Statement the Texas Court of Civil Appeals did not pass on the questions Appellant now seeks to raise.

THE JUDGMENT RESTS ON AN ADEQUATE NON-FEDERAL BASIS

The Texas Court of Civil Appeals determined that the controlling questions with respect to the temporary restraining order were whether Appellant had complied with the appropriate procedure in its initial application for the order and whether the issuing Judge had jurisdiction to issue the restraining order. Concluding that the order was improperly applied for and that Judge Allison had been mislead into issuing the order, the Court said:

> "First, at the time the temporary restraining order was signed, no pleadings had been filed and none were filed in Judge Allison's court until 9:10 a.m. the next morning. At that time there was pending an identical suit in the 190th District Court in Harris County. *The general common law rule in Texas is that the court in which suit is first filed acquires dominant jurisdiction to the exclusion of other coordinate courts.* (Citation omitted.) *Judge Allison, as a witness in this case, testified he was not told at the midnight meeting that an identical suit was filed, and in fact set for hearing in Houston the next morning. In order to recognize that dominant jurisdiction, he took the only course available to him, and that was to dismiss the temporary restraining order.*" 541 S.W.2d 209, 215. (Emphasis added.)

Having determined that a court other than Judge Allison's had prior jurisdiction of the case when the restraining order was issued, the Texas Court of Civil Appeals was not required to consider any questions concerning the issue of dissolution of the restraining order.

The lower court disposed of this case on the state procedural grounds that Appellant when seeking the restraining order had failed to comply with the proper state procedure, and had mislead Judge Allison.

NO SUBSTANTIAL FEDERAL QUESTION IS PRESENTED

Appellant's assertion that Judge Allison's dissolution of the temporary restraining order at Appellees' behest and that the subsequent foreclosure sale constituted state action or action under the color of state authority resulting in the deprivation of constitutionally protected rights lacks merit. *Leisure Estates of America, Inc. v. Carmel Development Company,* 371 F.Supp. 556 (S.D. Tex., 1974) and *Hoffman v. United States Department of Housing and Urban Development,* 371 F.Supp. 576 (N.D. Tex., 1974), *aff'd,* 519 F.2d 1160 (5th Cir. 1974), both cited by Appellant, clearly held that a foreclosure sale pursuant to and in accordance with a contractual loan agreement and deed of trust does not involve state action or action under color of state law. Both cases applied the "significance of state action" tests enunciated in *Adams v. Southern California First National Bank,* 492 F.2d 324 (9th Cir. 1974), in determining whether the requisite state involvement was present to

find a violation of the Fourteenth Amendment. The court in *Adams,* applying the "significance of state action" tests used by this Court in such equal protection cases as *Moose Lodge No. 107 v. Irvis,* 407 U.S. 163 (1972) and *Reitman v. Mulkey,* 387 U.S. 369 (1967), noted that it is "not perfectly clear that the same state action test" applies to due process cases, but that one must consider such cases with the concept in mind.

Appellant here maintains that the Court itself effected the foreclosure sale, by refusing to prohibit the sale, thus meeting the state action requirement of the Fourteenth Amendment. Appellee recognizes that in *Reitman,* this Court affirmed the California Supreme Court's finding that a provision of the California Constitution revoking certain anti-discriminatory laws was an authorization and encouragement of private discrimination and that this was such significant state involvement that the Fourteenth Amendment was applicable. The facts herein, however, are not analogous.

As mentioned above, the private, contractual foreclosure remedy of which Appellee was attempting to avail itself has not been held to be unconstitutional. Judge Allison's dissolution of an improperly obtained temporary restraining order does not constitute that significant state action necessary to raise a substantial federal question. Judge Allison was not authorizing or encouraging or in any way affirmatively supporting the foreclosure sale; he was merely dissolving a temporary restraining order that had been improperly granted because of: (1) Appellant's lack of compliance with state procedural requirements, and (2) a lack of jurisdiction in the issuing court due to dominant jurisdiction in the Houston court.

Appellee respectfully requests this Court to dismiss the appeal.

MOTION TO AFFIRM JUDGMENT

Alternatively, Appellee moves pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United States to affirm the judgment and order of the Supreme Court of Texas on the ground that the decision of the lower court is so obviously correct as to warrant no further review by this Court.

The Houston court in the first suit filed by FLR scheduled a hearing on Appellant's application for a temporary restraining order for 9:00 a.m. the morning following the date on which the application was filed. At the scheduled hearing Appellant would have been afforded the opportunity to demonstrate its entitlement to an order restraining the scheduled foreclosure sale. Preferring instead to seek an *ex parte* restraining order without being required to justify the issuance of the order, Appellant flew 250 miles, awakened Judge Allison and mislead him into issuing the restraining order while failing to disclose to Judge Allison that the specific matter they sought to have him rule upon had previously been set for hearing the following morning in Harris County, Texas, and therefore another court had dominant jurisdiction of the controversy.

The following morning when Appellee appeared at the scheduled hearing in Houston, Texas, and learned of Appellant's actions, it requested a hearing from Judge Allison. Notice of the hearing was hand delivered to Appellant's President, Mr. Olivere, and received by him in the presence of Mr. Dale Lee, one of the two lawyers

who accompanied Mr. Olivere to see Judge Allison the previous night. Also, notice was hand delivered to Appellant's counsel's office. Despite having been furnished notice of the hearing, Appellant elected not to attend. When it became apparent to Judge Allison that Appellant would not attend the scheduled hearing, Judge Allison caused Appellant and both of its counsel to be contacted by telephone and afforded them the opportunity to present their views in a telephone hearing. At the conclusion of the telephone hearing Judge Allison dissolved the temporary restraining order. Although a telephone hearing is not the usual and customary manner in which temporary restraining orders are dissolved, such procedure in this case was mandated by Appellant's own actions.

The Texas Court of Civil Appeals recognized that Judge Allison's actions were caused by Appellant, and therefore did not violate Rule 680, Tex. R. Civ. P. The comments of the Texas Court of Civil Appeals concerning Judge Allison's actions were limited to the facts of this case, to-wit:

> "Rule 680, Tex. R. Civ. P. permits the adverse party, on such notice as the court may prescribe, to move to dissolve the temporary restraining order and requires the court to determine such motion as expeditiously as the ends of justice require. We believe the District Judge did as the Rule requires, *recognizing the position he had been placed in after learning of the Houston suit.*" 541 S.W.2d at 215. (Emphasis added.)

This Court has previously recognized that: ". . . due process is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific

factual contexts." *Hannah v. Larache,* 363 U.S. 420, 442 (1960). "[T]he very nature of due process negates any concept of inflexible procedure universally applicable to every imaginable situation." *Cafeteria and Restaurant Workers, Local 473 AFL-CIO v. McElroy,* 367 U.S. 886, 895 (1961). In *Ballard v. Hunter,* 204 U.S. 241, 255 (1907) this Court remarked:

> "A precise definition [of due process of law] has never been attempted. It does not always mean proceedings in court. (Citation omitted.) Its fundamental requirement is an opportunity for a hearing and defense, but no fixed procedure is demanded. The process or proceedings may be adapted to the nature of the case."

Appellant herein was given the opportunity to present his case to a court in Houston, Texas. Appellant elected not to attend the Houston hearing, and instead sought an *ex parte* conference with another Judge in an effort to obtain the same equitable relief which was the subject of the Houston hearing. Prior to dissolving the restraining order, Judge Allison scheduled another hearing which Appellant likewise refused to attend. Judge Allison thereafter placed a telephone call to the participants of the midnight conference and afforded them the opportunity to comment on or defend their entitlement to the restraining order.

Appellee submits that under the facts of this case, Appellant was afforded due process of law. This appeal boils down to a request by Appellant that this Court approve Appellant's actions of "forum shopping" and of being less than fully candid with the Court.

Appellee prays that this Court affirm the judgment of the Texas Supreme Court.

CONCLUSION

Appellee respectfully urges that the appeal should be dismissed because the errors sought to be raised have not been seasonably raised by Appellant or passed on by the lower court. The errors asserted do not under the facts of this case present a substantial federal question. Alternatively, Appellee submits that the lower courts reached a correct result and the judgment and order of the Texas Supreme Court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion Pursuant to Rules 16(b) and 16(d) to Dismiss Appeal or Affirm Judgment has been duly served upon the following by United States Mail, postage prepaid, on this the _____ day of _____, 1977:

CERTIFIED MAIL

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KENNETH E. JOHNS, JR.

APPENDIX A

TEXAS RULES OF CIVIL PROCEDURE

Rule 324. Prerequisites of Appeal

In all cases tried in the county or district court, where parties desire to appeal from a judgment of the trial court, a motion for new trial shall be filed as a prerequisite to appeal; provided that neither a motion for new trial nor an assignment therein shall be a prerequisite to the right to complain on appeal of the action of the court in giving a peremptory instruction, or in rendering or refusing to render judgment non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, or in overruling a motion for judgment on the verdict made by the party who becomes appellant; nor shall a motion for new trial be required in a non-jury case or in a case where the appeal is based upon some error of the trial court arising after its action upon the motion for new trial. But a motion for new trial shall be a necessary prerequisite to consideration of the complaints mentioned in Rule 325. When judgment is rendered non obstante veredicto or notwithstanding the finding of the jury on one or more special issues, the appellee may bring forward by cross-point contained in his brief filed in the Court of Civil Appeals any ground which would have vitiated the verdict or would have prevented an affirmance of the judgment had one been entered by the trial court in harmony with the verdict, including although not limited to the ground that one or more of a jury's findings have insufficient support in the evidence or are against the overwhelming preponderance of the evidence as a matter of fact, and

the ground that the verdict and judgment based thereon should be set aside because of improper argument of counsel. In the event appellee assigns error by cross-point based upon an alleged improper argument of counsel, he shall support the same by proper bill of exceptions. The failure to bring forward by cross-points such grounds as would vitiate the verdict shall be deemed a waiver thereof, save and except such grounds as require the taking of evidence in addition to that adduced upon the trial of the cause. A motion for new trial shall not be necessary in behalf of appellee where he does not complain of the judgment or a part thereof.

Rule 325. Errors on Motions

In cases of motions for continuance, or for change of venue, or other preliminary motions made and filed in the progress of the cause, the rulings of the court thereon shall be considered as acquiesced in, unless complained of in the motion for new trial; and the judge may recite in his order disposing of the motion for new trial the grounds of such ruling. Nothing in Rule 324 shall render a motion for new trial unnecessary in the instances mentioned in this Rule nor in instances of newly discovered evidence, misconduct, fraud or the like.

Rule 374. Assignments of Error

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required shall be considered as waived. Complaint of the action of the court

on all matters arising under circumstances where no motion for new trial is required by these rules, if relied upon on appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary.

Rule 415. Briefs: Dismissal for Failure to File

When the appellant has failed to file his brief in the time prescribed, the appellate court may dismiss the appeal for want of prosecution, unless good cause is shown for such failure and that appellee has not suffered material injury thereby. The court, may, however, decline to dismiss the appeal, whereupon it shall give such direction to the cause as it may deem proper.

Rule 680. Temporary Restraining Order

No temporary restraining order shall be granted without notice to the adverse party unless it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before notice can be served and a hearing had thereon. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed ten days, as the court fixes, unless within the time so fixed the order, for good causes shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer

period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the application for a temporary injunction shall be set down for hearing at the earliest possible date and takes precedence of all matters except older matters of the same character; and when the application comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On two days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

APPENDIX B

Court of Civil Appeals

San Antonio, Texas

September 4, 1974

This is to inform you that in Cause No. 15,347 FLR Corporation, Appellant vs. Bill Blodgett, Trustee, and Texas First Mortgage Reit, Appellees, the Honorable Court of Civil Appeals today rendered judgment,

Appeal dismissed as moot in that briefs were not tendered.

Robert L. Cook, Clerk